Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

KAY L. ROGERSON, In propria persona,
Petitioner,

v.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT
Respondent,

On Petition for Writ of Certiorari
to the United States Court Of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Kay L. Rogerson*
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**Pro Se Petitioner of Record*

QUESTIONS PRESENTED FOR REVIEW

The following questions are related to a complaint filed on 7/23/2008 that disputes the validity of a Title VII agreement drafted by the United States District Court for the District of South Dakota, Western Division on 1/31/1996 (Appendix, p. 55) in settlement of a Civil Rights complaint between Petitioner and the United States Air Force (U.S.A.F.).

1. Whether the agreement becomes a federal crime in itself when it does not conform to the Civil Rights laws and includes subject matter that was not within the jurisdiction of the Court, or whether it becomes (or is) simply "void", or both?
2. Whether the validity of said agreement, can be deemed "valid" at the US District Court level by the same Court that drafted and signed it, and then be dismissed for jurisdictional reasons at the US Court of Appeals for the same District without telling a *pro se* plaintiff, who was a previous federal employee, who has jurisdiction?
3. Whether the agreement violates the establishment of a person's right to life, liberty, and the pursuit of happiness, and due process of law clause of the Fifth Amendment to the U.S. Constitution; and whether Petitioner must remain accused of a felony crime by the U.S.A.F. without a trial by an impartial jury in accordance with the Sixth Amendment to the Constitution?
4. Whether a "local rule" allowing "papers to be filed, signed, or verified by electronic means" is a lawful process to dismiss the validity of this agreement when the judge in the case is incapacitated and does not (or cannot) personally sign any certificate verifying this dismissal in accordance with 8th Circuit Rule 25A?

LIST OF PARTIES

1) KAY L. ROGERSON, Plaintiff, Petitioner

2) UNITED STATES OF AMERICA, Defendant, Respondent

Including:

- UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT
- UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, Western Division
- UNITED STATES AIR FORCE
- UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF SOUTH DAKOTA

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OPINIONS BELOW

The opinion of the U.S. District Court, District of South Dakota, Western Division in regard to the validity of a Title VII Civil Rights settlement is reported under Rogerson v. United States of America, CV. 08-5060-AWB, dated 5/13/2009. "As the Court concludes as a matter of law that the terms of the Settlement are clear and unambiguous, the Court chooses to enforce the agreement. Accordingly, it dismisses Plaintiff's claims which relate to the conduct of the Air Force and its employees prior to January 31, 1996, as barred by the Settlement signed by Plaintiff" (Appendix p. 53.) The "Court dismisses with prejudice Plaintiff's claims with regard to the validity of the settlement and allegations of Defendant's breach of the settlement" (Appendix p. 54.)

The opinion of the United States Court of Appeals for the Eighth Circuit, filed on August 31, 2009 is reported as Kay L. Rogerson v. United States of America, 09-2506. The case was dismissed upon the "motion of appellee for dismissal" using Eighth Circuit Rule 47A(b) (Appendix, p. 35) : "The appellee may file a motion to dismiss a docketed appeal on the grounds the appeal is not within the court's jurisdiction." This was based on the United States Attorney's Motion to dismiss dated August 12, 2009; however, the United States Attorney's motion to dismiss was based on Eighth Circuit Rule 47B, and not 47A(b) (Appendix, pp. 38, 43).

Appellant filed a Petition for Panel Rehearing on September 18, 2009 with the United States Court of Appeals for the Eighth Circuit. The motion denying rehearing by the panel,

filed by appellant, was dated October 22, 2009 and can be found under Kay L. Rogerson v. United States of America, No: 09-2506 (Appendix, p. 33).

JURISDICTION

On July 23, 2008, Plaintiff brought suit against the United States of America in the United States District Court for the Western Division of South Dakota, alleging that Defendant had violated a Title VII Civil Rights settlement agreement which had been drafted and signed by this same Court on 1/31/1996 while Plaintiff was depressed and receiving Federal Employees Compensation Act (FECA) benefits. Suit was brought because Plaintiff was terminated from her FECA benefits on 3/18/2007, denied her right to re-employment by her previous federal employer - the United States Air Force (USAF), denied employment for *any* federal agency, her federal retirement was denied, and her federal medical insurance was retroactively cancelled; and because the Civil Rights settlement agreement had alluded to the fact that the USAF had control of her FECA benefits and status by agreeing they would not "act or fail to act" in regard to an adverse impact to Plaintiff's FECA benefits and status. The complaint was filed after Plaintiff had exhausted all other administrative avenues of redress for her complaint including the Employees Compensation Appeals Board (who refused to answer any questions in regard to the civil rights settlement agreement), the Department of Labor (LABR), the Office of Personnel Management (OPM), and the Office of Special Council (OSC) who advised Plaintiff to address her issues to the Merit Systems Protection Board (MSPB).

In conjunction with breaching this agreement, Plaintiff alleged the agreement was in violation of Civil Rights laws and Articles V and VI of the Constitution because the agreement not only involved those Civil Rights issues which were rightfully before the Court on 1/31/1996 (*see* original complaints, Appendix pp. 60, 65), but it also dismissed Whistleblower Protection Act (WPA) issues and federal crimes which Plaintiff and her attorneys had previously exposed to her superiors at Ellsworth AFB, SD and to the Court, and were under federal investigation at the time of the signing of the agreement. Petitioner had also filed a complaint with the Equal Employment Opportunity Commission (EEOC) due to the breach of contract, and the EEOC advised her to file her complaint with the US District Court where the agreement was drafted and signed. MSPB also decided that the issues were out of their jurisdiction because the settlement agreement was made at the US District Court level.

Nine months later, on 4/22/2009, someone other than the judge who was ordered to handle this case (Judge Andrew Bogue) entered an ORDER DENYING MOTION TO CHANGE VENUE AND DENYING MOTION FOR EXPEDITION OF COMPLAINT AND TEMPORARY RELIEF, typing Judge Bogue's name on the dismissal document.

On 5/13/2009, someone other than The Honorable Judge Andrew Bogue entered an ORDER GRANTING MOTION TO DISMISS this complaint, typing Judge Bogue's name on the dismissal document.[1] On page 9 of that ORDER (Appendix, p. 54)

[1] Please note that the Honorable Judge Andrew Bogue was at his home in a remote area in the Black Hills of South Dakota, several miles from the Court, on his death bed. He died just 27 days after his name was typed on this document.

it states, "the Court dismisses *with prejudice* Plaintiff's claims with regard to the validity of the settlement and allegations of Defendant's breach of the settlement."

On 5/22/2009 Plaintiff Petitioned the US Court of Appeals for the Eighth Circuit for a Writ of Mandamus because she had been the victim of federal crimes in which the investigations were terminated with the agreement.

On 6/8/2009, the US Court of Appeals DENIED the Petition for Writ of Mandamus.

Because the Court had acted on the validity and breach of the agreement and dismissed it *with prejudice*, Plaintiff filed a NOTICE OF APPEAL on 6/15/2009 in regard to the validity and breach of the Title VII Civil Rights settlement agreement.

The US Court of Appeals, Eighth Circuit filed their ORDER dismissing this Appeal on 8/31/2009 using Eighth Circuit Rule 47A(b) (Appendix, p. 35).

Appellant filed a Petition for Panel Rehearing on 9/18/2009. The motion denying rehearing by the panel, filed by appellant, was denied 10/22/2009.

The jurisdiction of this Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1). Petitioner is filing this Petition for a Writ of Certiorari within the 90 days of the 10/22/2009 date when the motion for Panel Rehearing was denied, in accordance with Rule 13.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Civil Rights Act of 1964, CRA, Title VII, Equal Employment Opportunities 42 USC CHAPTER 21 - CIVIL RIGHTS

2000e-5 (3) "...Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter..."

2000e-16 (e) "Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government..."

28 USC § 1343 Civil rights & elective franchise

(a) "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any

State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 USC § 1985 Conspiracy to interfere with civil rights

(2) **Obstructing justice; intimidating party, witness, or juror:** "...if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; or

(3) **Depriving persons of rights or privileges** in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Fifth Amendment To The U.S. Constitution

No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment To The U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

29 Code of Federal Regulations, Part 1614 Federal Sector Equal Employment Opportunity Subpart A–Agency Program to Promote Equal Employment Opportunity

1614.101 General policy.

(a) "It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 USC 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 USC 621 *et seq.*), the Equal Pay Act (29 USC 206(d)) or the Rehabilitation Act (29 USC 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

Whistleblower Protection Act

"[A]ny disclosure of information" that a covered employee "reasonably believes" evidences "a violation of any law, rule, or regulation" or evidences "gross mismanagement, a gross waste of funds, an abuse of authority,..." is protected on the condition that the disclosure is not prohibited by law nor required to be kept secret... Moreover, "any disclosure" made to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, which the employee "reasonably believes" evidences "a violation of any law, rule, or regulation," or evidences "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" is also protected (5USC §2302(b)(8)(B). Agency heads are required to inform their employees of these protections (5USC §2302(c)).

The WPA expressly provides that "any disclosure of information" is protected With enactment of the WPA, Congress amended its statutory predecessor, the CSRA (Civil Service Reform Act of 1978, P.L. 95 -454, 92 Stat. 1114). In so doing, it changed the phrase "a disclosure" to "any disclosure," emphasizing the point that the courts, the OSC, and the MSPB should not erect barriers to disclosures that will limit the necessary flow of information from

employees with information of government wrongdoing (S.Rept. 100-413 (1988) at 13). In the Committee Report accompanying the WPA legislation, the Senate specifically criticized a 1986 decision by the US Court of Appeals for the Federal Circuit, Fiorello v. Department of Justice (795 F.2d 1544 (Fed. Cir. 1986))..."

18 U.S.C. § 1001, Fraud and False Statements

(a) ...whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years...

STATEMENT OF THE CASE

Facts Giving Rise To This Case

On 1/31/1996, during a pre-trial settlement negotiations hearing for a Civil Rights case in US District Court in Rapid City, SD, while Plaintiff was suffering from depression and receiving FECA benefits, Assistant USA Bonnie Ulrich admitted that criminal issues involving USAF personnel were strictly prosecutorial in nature and not a part of the civil rights case; however, she then helped draft and signed an agreement that dismissed these actions when federal Magistrate Marshall Young

initiated a "global settlement" to terminate the Civil Rights lawsuit rightfully before US District Judge Richard Battey. This was done after Judge Battey had bifurcated the most condemning civil rights violations from the case before the Court.

Three of the criminal issues involving USAF personnel which Assistant USA Ulrich had discussed and which the Court was aware of were 1) stolen identity under investigation by the USAF's Office of Special Investigation (OSI); 2) a money-laundering scheme between the USAF and Rockwell which Plaintiff had reported to USAF personnel, who then threatened her life if she continued to report it, and who then wrongfully accused her of a federal crime (an "Anti-Deficiency Act" violation); and 3) obscene telephone calls by a military member to her home. The Anti-Deficiency Act violation was annotated on her performance rating and the rating downgraded. Then, *unbeknownst* to Plaintiff at the time, her Civil Service job level was downgraded from a GS-13 to a GS-12, and her FECA benefits were paid at the lower GS-12 level the entire time she was receiving these benefits, including the day this agreement was made. None of this information was relayed to Plaintiff. Instead, they covered up this information, and tried to protect themselves with paragraphs in the agreement which state:

> 1. "That the parties... agree to settle and compromise the above-entitled action [which was the Civil Rights case before the Court] involving allegations of employment discrimination, including but not limited to sex, sexual harassment, age, and reprisal, and *any and all claims relevant to the plaintiff's past and present employment with the United States Air Force*, upon the terms indi-

cated herein." (Appendix, p. 55.)

2. "This... agreement does not constitute an admission of liability or fault of the defendant, or any past, present or future employees, representatives, servants, agents, or any other persons standing in any representative capacity, nor shall this agreement or any provision hereof, be used in conjunction with any judicial, administrative, quasi-judicial, or any other form of proceeding, for the purpose of attempting to establish any such liability or fault " (Appendix, p. 55.)

5.b. "*Plaintiff... will withdraw any and all pending grievances, complaints and/or appeals relating to her employment* with the United States Air Force, *whether or not they are discrimination related*, against the United States Air Force." (Appendix, p. 57)

This agreement was never tied to Plaintiff's recovery from a compensable injury, which was not the issue before the Court; however, the judges and attorneys also included the following statement in regard to her FECA status and benefits:

3.b. "The United States Air Force agrees that it will not officially act, or fail to act, for the purpose of adversely affecting plaintiff ROGERSON'S Department of Labor, Office of Workers Compensation Program (OWCP) benefits or status." (Appendix, p. 56.)

The above statements have caused major controversy in this case. In essence, this Civil Rights settlement agreement covered subject matter/issues which were not within the subject matter jurisdiction of this Court. The matter before the Court was strictly a Title VII Civil Rights case (*see* original complaint, Appendix, pp. 60, 65.) Further, it does

not conform to the Civil Rights statute 29 CFR 1614 for federal employees or Supreme Court decisions in regard to Title VII agreements (*see* Supreme Court's holding in *Abermarle Paper Co. v. Moody*.)

The above agreements were also made under the auspices that Plaintiff never return to her job at Ellsworth AFB, SD or any other United States Air Force (USAF) position "in exchange" that the USAF would never "act or fail to act" in regard to her FECA "status and benefits." Also, the US Attorney's Office threatened Plaintiff with monetary sanctions and injunctive relief should she even talk to the USAF about re-employment. Plaintiff depended upon the federal government to "act" in regard to her FECA benefits, which they now admit they have no control over, and as a result of this Civil Rights settlement agreement has been denied a federal job, has been denied her retirement, and her medical insurance was retroactively cancelled; and, she remains wrongfully accused of a crime - an Anti -Deficiency Act violation as annotated on her personnel records. She is now 65 years of age.

The District Court Proceedings

Petitioner filed a complaint in US District Court, *pro se*, asking for a change of venue, expedition of complaint, temporary relief, and that the case be handled in accordance with 18 USC, Part II Criminal Procedure, Chapter 237, Section 3771 Crime Victim's Rights because the Title VII agreement dismissed the criminal activity surrounding the USAF's wrongful accusation of Plaintiff of an Anti-Deficiency Act violation, and which she remains wrongfully accused of to this very day, and her life was threatened by the USAF should she report it further.

The case was first given to US District Court Judge Karen Schrier, who recused herself. She was the US Attorney (USA) who signed/approved the agreement. Chief District Court Judge Lawrence Piersol then ORDERED this case be given to Judge Andrew Bogue, who was 90 years old and in deteriorating health. He never issued any ORDERS, or made any DECISIONS himself, on this case. He made no responses to Plaintiff's letters.

The United States (Defendant) did not respond to the Summons and Complaint within 60 days in accordance with Fed. R. Civ. P. 12(a)(3). Instead, the US Attorney's office issued a document to Plaintiff for a different case; the service of process was not made pursuant to statute; and they abused the electronic filing system by filing a response to the correct case with the Court.

Plaintiff wrote a letter to Judge Bogue asking about default judgment. There was no response. Plaintiff responded to motions by Defendant. There was no action on the case after three months. It was later learned from his obituary and news articles in the Rapid City Journal that Judge Bogue quit practicing as a US District Court Judge in January 2009. No decisions were made in regard to the motions for a change of venue, expedition of complaint, or temporary relief until 4/22/2009, when Judge Bogue was incapacitated. The unsigned order denied all Plaintiff's motions for change of venue, expedition of complaint, and temporary relief.

On 5/13/2009, someone other than Judge Andrew Bogue entered an ORDER GRANTING MOTION TO DISMISS, typing Judge Bogue's name on the dismissal document (Appendix, p. 45). This ORDER states:

"As the Court concludes as a matter of law that the terms of the Settlement are clear and unambiguous, the Court chooses to enforce the agreement. Accordingly, it dismisses Plaintiff's claims which relate to the conduct of the Air Force and its employees prior to January 31, 1996, as barred by the Settlement signed by Plaintiff." (Appendix, p. 53.)

"...the Court has found that the Settlement requires no affirmative conduct from Defendant to protect Plaintiff's benefits, no breach can result from their failure to so act. Additionally, Plaintiff states no claim when she contends that staff of the US Attorney's Office have informed her that her continued attempts to gain reemployment with the Air Force are prohibited by the Settlement, as their conduct in doing so is in accordance with the unambiguous terms of the Settlement." (Appendix, p. 54.)

"...the Court dismisses *with prejudice* Plaintiff's claims with regard to the validity of the settlement and allegations of Defendant's breach of the settlement." (Appendix, p. 54.)

The Appellate Court Proceedings

Petitioner filed a Notice of Appeal with the US District Court on 6/15/2009. The opinion of the United States Court of Appeals for the Eighth Circuit, filed on 8/31/2009 is reported as Kay L. Rogerson v. United States of America, 09-2506 (Appendix, p. 35.)

On 8/12/2009, two months after The Honorable Judge Bogue died, the US Attorney's Office issued a motion: UNITED STATES' MOTION FOR SUSPENSION OF BRIEFING SCHEDULE OR TO EXTEND BRIEFING DEADLINE AND

FOR AFFIRMANCE PURSUANT TO 8th CIRCUIT RULE 47B. The USAO based their argument on (4) no error of law appears. (Appendix, p. 36.)

The case was dismissed upon the "motion of appellee for dismissal" using Eighth Circuit Rule 47A(b): "The appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction." However, the U.S. Attorney's Motion to dismiss dated 8/12/2009 used Rule 47B(4) "no error of law appears." (The case was still assigned to Judge Bogue, who was deceased.)

Petitioner/Plaintiff filed a Petition for Panel Rehearing on 9/18/2009 with the U.S. Court of Appeals for the Eighth Circuit. The motion denying rehearing by the panel, filed by appellant, was dated October 22, 2009 and can be found under Kay L. Rogerson v. United States of America, No: 09-2506 (Appendix, p. 33.)

REASONS WHY CERTIORARI SHOULD BE GRANTED

The law is well-settled that a void order or judgment is void even before reversal. Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S.Ct. 116 (1920) "Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply VOID, and this even prior to reversal"; Old Wayne Mut. I. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907); Williamson v. Berry, 8 How. 495, 540, 12 L.Ed.1170, 1189 (1850); Rose v. Himely,4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808).

It is also clear and well established law that a void order can be challenged in any court at any time. People v. Wade, 116 Ill.2d 1, 506 N.E.2d 954 (1987) "A void judgment may be attacked at any time, either directly or collaterally;" Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907) "jurisdiction of any court exercising authority over a subject `may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings,' and the rule prevails whether `the decree or judgment has been given, in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states.'"

The Defendant was prejudiced in their dismissal of the validity and breach of this agreement as they are the same offices that drafted, signed, and approved of this agreement, dismissing federal crimes under investigation by federal agencies, and forever dismissing Plaintiff's rights to due process of law in accordance with the Fifth Amendment to the Constitution to clear her name of a wrongful felony accusation of an Anti-Deficiency Act violation by the USAF. The record clearly shows that instead of responding to the fact that the agreement was written outside the subject-matter jurisdiction of the Court, the Defendant tries to defend their unlawful actions by stating the agreement is unambiguous and therefore, it is valid.

This case began as a complex civil rights case against the United States Air Force and has evolved into a case about the validity of the resulting agreement. It includes judges that have acted outside their jurisdictional authority by dismissing criminal activ-

ity by federal agencies/personnel through a civil rights settlement agreement, and judicial disability, by ordering this case be given to a 90 year old judge whose health deteriorated to the point that he was incapacitated when the Court issued dismissal orders in his name, was deceased at the time the U.S. Attorneys responded to the appeal of this case, and the Court never appointed a judge to replace him in accordance with Federal Rules of Civil Procedure.

Petitioner will show that this case has so far departed from the accepted and usual course of judicial proceedings, and that the US Court of Appeals has sanctioned such a departure by a lower court, that Petitioner pleads that the Supreme Court will exercise it's supervisory power over the lower courts.

I. Review is Warranted Because The Courts of Federal Appeals have Territorial and Subject Matter Jurisdiction to oversee the U.S. District Court per the U.S. Constitution, Article III (1783) and 28 USC § 1291, and this should not exclude the Validity of Agreements Made Under Federal Civil Rights Statutes at the District Court Level.

The courts of appeals have jurisdiction of appeals from all final decisions of the district courts per the United States Constitution, Article III (1783) and 28 USC § 1291. Civil rights laws and 29 CFR 1614 gave US District Courts exclusive jurisdiction to hear civil rights claims. Because the US District Court has the authority to issue a Decision in this case, then the US Court of Appeals for the Eighth Circuit should also have jurisdiction to hear this case. If they have no jurisdiction in regard to District Court decisions of Civil Rights matters, then the Civil Rights Statute denies a previous federal employee her right to due process of law to appeal a final decision by a US District

Court in accordance with the Fifth Amendment To The U.S. Constitution

The question becomes, "Where does a previous federal employee go to for help in resolving the validity of a Title VII Civil Rights settlement agreement drafted and signed at the US District Court level which includes subject matter which was not within the jurisdiction of the Court, nor was it ripe for any Court action?" After exhausting all other avenues, a complaint was filed in US District Court.

On 5/13/2009, the US District Court concluded: "As the Court concludes as a matter of law that the terms of the Settlement are clear and unambiguous, the Court chooses to enforce the agreement." There is absolutely no way the Court can enforce this agreement because neither the Court, nor the US Air Force, nor the US Attorney's Office have subject matter jurisdiction to dismiss federal crimes which were not properly before the Court, nor do they have jurisdiction over the Federal Employees Compensation Act, all of which became an unlawful part of a Civil Rights settlement agreement. The subject matter correctly before the Court was strictly a Civil Rights case brought about in accordance with 29 CFR 1614, per order of the Equal Employment Opportunity Commission (EEOC). The District Court's actions are in total disagreement with cases in other federal circuits and with previous Supreme Court rulings:

Subject-matter jurisdiction is the authority of the court to hear and make a determination in a court action. In Interest of M.V., 288 Ill.App.3d 300, 681 N.E.2d 532 (1st Dist. 1997). Without subject-matter jurisdiction, all of the orders and judgments issued by a judge are void under law, and are of no legal *force*

or effect. And, "Every act of the court beyond that power is void".

In Interest of M.V., 288 Ill.App.3d 300, 681 N.E.2d 532 (1st Dist. 1997) "Where a court's power to act is controlled by statute, the court is governed by the rules of limited jurisdiction, and courts exercising jurisdiction over such matters must proceed within the strictures of the statute." Also, in Vulcan Materials Co. v. Bee Const. Co., Inc., 101 Ill. App.3d 30, 40, 427 N.E.2d 797 (1st Dist. 1981) "Though a court be one of general jurisdiction, when its power to act on a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction." In the instant case, the US District Court has exclusive jurisdiction in all Civil Rights matters per the Civil Rights Act of 1964 and 29 CFR 1614 (*see also* McCullough v United States, 76 Fed. Cl. at 5; Hanes v United States, 44 Fed. Cl. 441, 449 (1999); Blassingame v United States, 33 Fed. Cl. 504, 505 aff'd, 73 F.3d 349 (Fed. Cir. 1995), 517 U.S. 1237 (1996); Lee v. United States, 33 Fed. Cl 374, 379, 1995.)

"A judgment or order issued without subject matter jurisdiction is void, and *that defect may be raised at any time and may not be waived.*" Editorial Photocolor Archives v Granger Collection, 61 NY2d 517, 523. Therefore, a judgment from a court that did not have subject-matter jurisdiction is forever a nullity.

Brown v VanKeuren 340 Ill. 118 122 (1930), "Whatever the rank of the court exercising a special statutory jurisdiction, it is governed by the same rules as courts of limited jurisdiction."; Midland Coal Co. v. Knox County, 268 Ill.App.3d 485, 644 N.E.2d 796 (4th Dist. 1994) "Special statutory jurisdiction is limited to the language of the act conferring it, and the court has no powers from any other source... [T]he authority of the court to make any order must be

found in the statute." Levy v. Industrial Comm'n (1931), 346 Ill. 49, 51, 178 N.E. 370, 371." In the instant case, the authority for the Civil Rights settlement agreement is found under The Civil Rights Act of 1964, 29 CFR 1614, and 42 USC § 1985 Conspiracy to interfere with civil rights. There is absolutely no authority for the Court to include these other issues in a Civil Rights settlement.

Johnson v. Theis, 282 Ill.App.3d 966, 669 N.E.2d 590 (2nd Dist. 1996) "A court in the exercise of special statutory jurisdiction is limited in its power by the language of the act conferring such jurisdiction." In the instant case, the Court was limited by the Civil Rights Act of 1964, 29 CFR 1614, and 42 USC § 1985 .

The criminal proceedings interlaced with this agreement should be reported to the FBI and these matters should be prosecuted by that federal agency; however, the validity and breach of the agreement is still a civil matter that was rightfully before the Court, giving the US Court of Appeals for the 8th Circuit subject matter and territorial jurisdiction regarding the validity of the agreement, unless, of course, they recognized it as a "void" contract without so specifying.

Because a void order has no legal force or effect there can be no time limit within which to challenge the order or judgment. Further, since the order has no legal force or effect, it can be repeatedly challenged, since no judge has the lawful authority to make a void order valid. Bates v. Board of Education, Allendale Community Consolidated School District No. 17, 136 Ill.2d 260, 267 (1990) - a court "cannot confer jurisdiction where none existed and cannot make a void proceeding valid."; People ex rel. Gowdy v. Baltimore & Ohio R.R. Co., 385 Ill. 86, 92, 52

N.E.2d 255 (1943). The US Court of Appeals for the 8th Circuit has a Constitutional obligation to review the decision of the lower court.

II. Review of the Validity of a Civil Rights Settlement Agreement Is Warranted Because Of The National Importance In Determining Whether The Civil Rights Act Can be Used by the Federal Government as an Unconventional Means to Dismiss Federal Crimes within their Own Doors

Federal judges, federal magistrates, and United States attorneys take oaths of office and make code of ethics promises to uphold the Constitution and laws of the land. They have a judicial obligation to further expose alleged criminal activity by federal employees and federal agencies when it is reported to them. This case is about a Title VII civil rights settlement which the Court and US Attorneys interlaced with criminal issues which were under investigation by federal offices, and which were divulged to the Court and US Attorney's Office during the course of a Civil Rights trial. Instead of exclusively settling the Civil Rights case before them in accordance with the Civil Rights Act, 29 CFR 1614, and previous Supreme Court holdings, a settlement agreement was drafted and signed which included a dismissal of *"any and all claims relevant to the plaintiff's past and present employment with the United States Air Force"*, and demanded *"Plaintiff... will withdraw any and all pending grievances, complaints and/or appeals relating to her employment"* with the United States Air Force, "...*whether or not they are discrimination related...*" The USAF failed to turn these criminal investigations over to the Federal Bureau of Investigation (FBI), and terminated the investigations and processing through a conspiracy with the US District

Court and US Attorney's office in Rapid City, SD using a Title VII Civil Rights settlement agreement—a violation of 42 US Code § 1985. Conspiracy to interfere with civil rights, the WPA, and other criminal statutes.

The same US District Court that drafted the Civil Rights agreement, is now stating that this same criminal activity cannot be adjudicated because a "private person" cannot bring criminal actions against the federal government into US District Court - a complete reversal of the fact that it was the Court and United States attorneys who included the dismissal of these crimes with the settlement agreement. A Court of Law cannot have it both ways, and Plaintiff has a Constitutional right to due process of law. If they have no jurisdiction to adjudicate these criminal actions, then they are admitting the agreement is not valid. It is "void" because they lacked subject-matter jurisdiction to dismiss criminal issues under federal investigation with a Title VII agreement Plaintiff is due relief in accordance with several regulations in regard to these issues, including 18 U.S.C. Part 1, Chapter 47 § 1031; 5 U.S.C. § 8151; the Civil Rights Act and 29 CFR 1614; and the Whistleblower Protection Act, among others; and the Title VII civil rights settlement agreement is unlawfully prohibiting her from her Constitutional rights to due process of law, employment or re-employment with the federal government, and her retirement. Because the agreement dismissed federal crimes, there is also the question of whether the agreement itself becomes a violation of 18 U.S.C. § 1001, Fraud and False Statements.

It appears that the US District Court and US Attorney's Office personnel that drafted, signed, and approved of this Title VII agreement are prejudiced and will not make a non-biased ruling in regard to the va-

lidity of same. They have dismissed all aspects of this case to protect themselves and members of the judicial system who were directly involved with drafting, signing, and approving of this agreement. Petitioner/ plaintiff has been wrongfully accused of a federal crime in retaliation for reporting federal crimes, and it is time the federal government deals with these matters in accordance with the law instead of continuing to cover them up with a Civil Rights agreement long overdue to be deemed invalid and VOID.

The judge has a duty to continually inspect the record of the case. Should a judge act in any case in which he does not have subject-matter jurisdiction, he is acting unlawfully, U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821), and without any judicial authority. In the original case Judge Richard Battey and Magistrate Marshall Young acted unlawfully by including subject matter that was not within their jurisdiction according to Civil Rights statutes. This is also a violation of 42 US Code § 1985. Conspiracy to interfere with civil rights.

The same US District Court that wrote the original agreement has once again deemed it to be "valid"; thereby, contributing to, and approving of, the fraud and unlawful actions of the previous District Judge and Federal Magistrate who drafted and approved of the unlawful agreement to begin with. This is an additional violation of 18 U.S.C. § 1001, Fraud and False Statements.

In a court of limited jurisdiction, which is the case when the US District Court adjudicates a civil rights complaint, whenever a party denies that the court has subject-matter jurisdiction, it becomes the duty

and the burden of the party claiming that the court has subject-matter jurisdiction (in this case the Court itself) to provide evidence from the record of the case that the court holds subject-matter jurisdiction Bindell v. City of Harvey, 212 Ill.App.3d 1042, 571 N.E.2d 1017 (1st Dist. 1991) "the burden of proving jurisdiction rests upon the party asserting it." In the present case, the Court wrongfully portrayed it had subject-matter jurisdiction by including other matters besides the civil rights issues directly before the Court into a Title VII civil rights settlement agreement, and the record will show that neither the Court nor the US Attorney's Office proved differently. In fact, they now agree they had no subject matter jurisdiction; however, they are still maintaining the agreement is "valid" because it is unambiguous. A judge should not proceed in any action in which he/she does not have subject-matter jurisdiction, since he/she has no lawful authority to act.

A court must proceed exactly according to the law or statute under which it operates. Flake v. Pretzel, 381 Ill. 498, 46 N.E.2d 375 (1943). In State Bank of Lake Zurich v. Thill, 113 Ill.2d 294, 497 N.E.2d 1156 (1986), the Supreme Court has ruled that "Because a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record", the record of the case is the determining factor as to whether a court has jurisdiction. The US District Court has exclusive jurisdiction for all civil rights issues in accordance with the Civil Rights Act and 29 CFR 1614 and case history as previously cited. It does not have jurisdiction to include dismissal of criminal acts by federal agencies, nor to make promises in regard to the FECA, in conjunction with a Title VII civil rights agreement.

If the US District Court and the Appeals Court for the Eighth Circuit continue to uphold the validity of a Title VII Civil Rights settlement agreement that unlawfully dismisses federal crimes and makes false promises in regard to the FECA, all of which are *not* within the jurisdiction of the Civil Rights Act or 29 CFR 1614, then the integrity of the judicial system and the US Constitution are at stake.

III. Review is Warranted Because of the Importance In Determining Whether the U.S. Attorney's Office can Make Decisions to Dismiss a Complaint when the District Court Judge Becomes Incapacitated and/or After He Is Deceased, and When the Court Has Not Appointed a New Judge to Take His Place

Motions made by the US Attorney's Office to the US Appeals Court, were made two months after Judge Bogue was deceased, and the District Court had not appointed another judge to replace him. The US Attorney's Office used Eighth Circuit Rule 47B in their motion to dismiss, stating that "no error of law appears." This agency helped draft, and signed, the unlawful agreement. They were prejudiced and biased and tried to protect themselves. As previously stated, a court must proceed exactly according to the law or statute under which it operates. Flake v. Pretzel, 381 Ill. 498, 46 N E.2d 375 (1943). Neither the Civil Rights Act or federal rules of court procedure allow the US Attorney's Office to take over a civil rights case once a judge is incapacitated or deceased. In this instance, the US Attorney is a "trespasser of the law" because those who advise and act with [a judge who has no subject-matter jurisdiction], or execute his process, are trespassers", Von Kettler et.al. v. Johnson, 57 Ill. 109 (1870).

Again, this entire case has so far departed from the accepted and usual course of judicial proceedings that Petitioner pleads that the Supreme Court will exercise it's supervisory power over the lower courts. This also appears to be a violation of due process, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938); Pure Oil Co. v. City of Northlake, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956); Hallberg v. Goldblatt Bros., 363 Ill. 25 (1936).

IV. Review Is Warranted Because the Title VII Civil Rights settlement agreement Conflicts With The Supreme Court's Holding in Abermarle Paper Co. v. Moody

The Supreme Court has provided guidance as to the nature and scope of remedies available under Title VII. In Abermarle Paper Co. v Moody, 422 U.S. 405 (1975) under Title VII, the Court held that the purpose of Title VII is to make victims of discrimination whole, and have also held that the scope of relief available to federal employees under Title VII is governed by the provisions of 42 U.S.C. Sections 2000e-16 and 2000e-5(f) through (k). In Brown *v. GSA*, 425 U.S. 820 (1976), referring to 42 U.S.C. Sections 2000e-16 and 2000e-5(f) through (k); and *Brown*, 425 U.S. at 828-829, referring to 118 Cong. Rec. 4942 (1972), the Court examined the legislative history and language of Section 717 of Title VII (42U S.C. Section 2000e-16), and found that Congress had intended it to create an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination. Further, EEOC regulations specifically provide that a victim of discrimination shall be extended an unconditional offer of placement in the position that the person would have occupied but for the discrimination (*See* e.q. Library of Congress v. Shaw, 106 S. Ct. 2957 (1986).)

The District Court has ignored the Supreme Court's ruling and has destroyed the integrity of the United States government by failing to set the highest standards for Civil Rights and non-discriminatory employment practices.

V. Review Is Warranted Because Of the Precedence That Could Be Set In Regard to the Abuse of a US District Court's Electronic Filing System

ALL of the dismissal orders from The Honorable Andrew Bogue were made while the judge was incapacitated and someone other than the judge submitted the documents by using the US District Court's Electronic Filing System, typing his name on the documents. The Court could not prove that these documents were, in fact, the judge's orders because the judge did not sign any certificate in accordance with Rule 25A of the 8th Circuit Rules for Electronic Filing. Further, the judge was incapacitated, and neither the Court nor the US Attorney's office notified the plaintiff, and no one processed the paperwork in accordance with Fed R. Civ. P. 63 - Judge's Inability to Proceed. Also, the US Attorney's office provided the US District Court with a different document than they provided the plaintiff in answer to the Summons and Complaint. They used the electronic filing system to provide their response to the Court, and this differed from the response to Petitioner/Plaintiff. The judge was incapacitated, and the US Attorney would not admit to his own errors of improperly responding to the complaint. His service of process was not made pursuant to statute. The US Attorney was given a free ride by the Court to destroy the career of the Plaintiff while protecting themselves and the judicial officers of judicial wrongdoing.

CONCLUSION

A few of the main elements in which the US District Court was without subject-matter jurisdiction in regard to the Title VII civil rights settlement agreement, and in the instant complaint questioning the validity of the agreement, making the document void are: (1) a judge/federal magistrate does not follow statutory procedure, Armstrong v. Obucino, 300 Ill. 140, 143 (1921); (2) unlawful activity of a judge/federal magistrate, Code of Judicial Conduct; (3) violation of due process, Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938); Pure Oil Co. v. City of Northlake, 10 Ill.2d 241, 245, 140 N.E.2d 289 (1956), Hallberg v. Goldblatt Bros., 363 Ill. 25 (1936); (4) the court exceeded its statutory authority, Rosenstiel v. Rosenstiel, 278 F. Supp. 794 (S.D.N.Y. 1967); (5) where a response to a summons and complaint was not properly issued by the Defendant; (6) where service of process was not made pursuant to statute, Janove v. Bacon, 6 Ill.2d 245, 249, 128 N.E.2d 706, 708 (1955); (7) where the judge does not act impartially, Bracey v. Warden, U.S. Supreme Court No. 96-6133 (June 9, 1997); and/or (8) where an order/judgment is based on a void order/judgment, Austin v. Smith, 312 F.2d 337, 343 (1962); English v. English, 72 Ill.App.3d 736, 393 N.E 2d 18 (1st Dist. 1979).

Because of the many elements of law that were not complied with, the judge is without subject-matter jurisdiction and his/her orders and judgments are void and of no legal force or effect. Should the judge not have subject-matter jurisdiction, then the law states that the judge has not only violated the law, but is also a trespasser of the law. Von Kettler et.al. v. Johnson, 57 Ill. 109 (1870) "if the magistrate has not such jurisdiction, then he and those who advise and act with him, or execute his process, are

trespassers."; Elliott v. Peirsol, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828) "without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."; In re TIP-PA-HANS Enterprises, Inc., 27 B.R. 780, 783 (1983) a judge "lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists", when a judge acts "outside the limits of his jurisdiction, he becomes a trespasser ... ". "... courts have held that where courts of special or limited jurisdiction exceed their rightful powers, the whole proceeding is coram non judice ... ".

If a judge acts without subject-matter jurisdiction, the judge is acting unlawfully, he/she has committed an unlawful interference with one's person, property, or rights. And all orders and judgments issued by a judge who acts without subject-matter jurisdiction are, as a matter of law, **void**.

The short and basic questions are: how far can the federal government, including the federal judicial system, go to deny a federal employee, or a previous federal employee, their Constitutional rights to due process of law in regard to Civil Rights violations and criminal wrongs; how far can they be allowed to go to deny an injured federal employee re-employment; how many federal officials does it take for the federal

government to admit to a violation of 18 U.S.C. § 241 Conspiracy against rights; and how destitute does a previous federal employee have to become before someone in the federal government or judicial system has the integrity to act in accordance with the law to undo the previous wrongs?

Plaintiff has been directly and proximately harmed as the result of government officials committing numerous Federal offenses throughout the entire time she was employed at Ellsworth AFB and while she was receiving FECA benefits. She is the victim of major crime. The Agreement, signed by Plaintiff under duress, deceit, and coercion while she was receiving FECA benefits for depression brought upon by the very issues covered up by the Agreement, clearly gave the federal government an illegal open book to continue to harass, threaten, and bully Plaintiff with total disregard of criminal laws or Civil Rights laws. Federal officials acted unlawfully in drafting this agreement while imposing additional harm to Plaintiff, failing to protect her in accordance with the Whistleblowers Protection Act, the Constitution, and other laws of the land, completely destroying her right to a career and happiness in life. Petitioner/plaintiff is caught in a merry-go-round of time limits, prohibited personnel practices, unlawful agreements, and corroboration of unlawful procedures between federal agencies and federal Courts. Her case was ORDERED to be handled by a dying, and now deceased, federal judge, who the US Court of Appeals for the Eighth Circuit deemed "able" to do his job, dismissing petitioner's Judicial Disability complaint that the judge was both mentally and physically disabled while he was at home dying. Someone else in the Court was signing his name to dismissal documents using the electronic filing system. And, the US Court

of Appeals got around making any decisions by simply dismissing the case for some unknown "jurisdictional" reason.

This entire case has so far departed from the accepted and usual course of judicial proceedings that Petitioner pleads that the Supreme Court will exercise it's supervisory power over the lower courts. The federal government and our courts should be leading the way in upholding the Constitution and laws of our land.

Based on the foregoing, *pro se* Petitioner Kay L. Rogerson respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider reversal of the decision of the Eighth Circuit Court of Appeals to deny an appeal of the validity of a Title VII Civil Rights settlement agreement drafted, signed and approved of by a lower court of law within their circuit and which includes issues/elements outside the jurisdiction of the judges of that court; or it may wish to order the settlement agreement "void", and remand this case back to the US District Court to expedite the processing of the Civil Rights issues in this case in a lawful manner.

Dated: 14th day of December 2009.

Respectfully submitted,

Kay L. Rogerson

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2506

Kay L. Rogerson,

Appellant

v.

United States of America,

Appellee

Appeal from U.S. District Court
for the District of South Dakota
(5:08-cv-05060-AWB)

ORDER

The petition for rehearing by the panel filed by appellant is denied.

October 22, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Note: The Appeals Court did not list the names of the judges who denied this Petition for Panel Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2506

Kay L. Rogerson,

Appellant

v.

United States of America,

Appellee

Appeal from U.S. District Court
for the District of South Dakota
(5:08-cv-05060-AWB)

MANDATE

In accordance with the judgment of 08/31/2009, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter..

October 29, 2009

(unsigned)
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2506

Kay L. Rogerson,

Plaintiff—Appellant

v.

United States of America,

Defendant—Appellee

Appeal from U.S. District Court
for the District of South Dakota
(5:08-cv-05060-AWB)

JUDGMENT

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b)

Appellee's motion for suspension of briefing schedule or to extend briefing deadline is denied.

August 31, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Note: The Appeals Court did not list the names of the judges who denied this Appeal

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Kay L. Rogerson, No: 09-2506

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

UNITED STATES' MOTION FOR SUSPENSION OF BRIEFING SCHEDULE OR TO EXTEND BRIEFING DEADLINE AND FOR AFFIRMANCE PURSUANT TO EIGHTH CIRCUIT RULE 47B

Appeal from the U.S. District Court for the District of South Dakota, Western Division

The Honorable Andrew W. Bogue
United States District Judge*

This matter is before the Court upon the motion of the United States to summarily affirm the District Court's Order granting Defendant's Motion to Dismiss entered May 13, 2009. This motion is based upon Eighth Circuit Rule 47B and the reasons set forth in the following legal argument. The United States also seeks the suspension of the current briefing schedule pending the determination of this motion. Currently, the United States' brief is due August 19, 2009. If this Court is not inclined to suspend the schedule indefinitely, the Government, alternatively, requests that it extend the briefing deadline by

* **Note**: The Honorable Andrew W. Bogue had been deceased for over two months when the US Attorney's office made this Motion on his behalf.

thirty (30) days in order to allow the disposition of the motion for summary affirmance.

INTRODUCTION

Petitioner Kay Rogerson ("Rogerson") is appealing the District Court's Order granting Defendant's Motion to Dismiss her Complaint. *See* Addendum 1 (5/13/09 Order). Rogerson's appeal should be summarily dismissed because all of the issues presented in this appeal have been previously litigated and disposed of in several other actions brought by Rogerson. Each time Rogerson filed a Complaint against the United States, she has alleged the same issues which are before this Court. Each lawsuit has either been dismissed by Rogerson or disposed of by the District Court after a finding that Rogerson's *pro se* Complaints are without merit.

Rogerson initially filed a Complaint against the United States Air Force on March 13, 1992 alleging sexual discrimination, sexual harassment, and retaliation. Rogerson dismissed her Complaint pursuant to the Stipulation for Compromise Settlement filed February 8, 1996 ("Settlement Agreement"). Rogerson received $360,000 as consideration for the dismissal of her Complaint.

On April 3, 2000, Rogerson brought another action against the United States Air Force alleging the very same issues raised in her current Complaint. Rogerson alleged that her federal worker's compensation benefits were illegally terminated and challenged the validity of the Settlement Agreement. She alleged that she was coerced and intimidated into signing the Settlement Agreement. In addition, Rogerson claimed the Settlement Agreement was void because it stripped her of her Constitutional rights, violated the Privacy Act, and denied her due process. Finally, just as she does in the present action, Rogerson claimed in

her prior action that the United States deprived her the right to receive unemployment benefits, the right to employment by the United States Air Fore, the right to priority placement once her worker's compensation benefits were terminated, her right to be employed in any position with the United States Air Force, her Vocational Rehabilitation rights, and many other claimed rights too numerous to mention. On November 15, 2000, Rogerson stipulated to the dismissal of her April 3, 2000 action on the merits with prejudice. On November 21, 2000, the District Court entered its Order dismissing the April 3, 2000 action pursuant to the Stipulation and with prejudice.

Rogerson filed the action that is the subject of the current appeal in District Court on July 23, 2009 [sic]. In her Complaint, Rogerson alleges various violations of numerous federal criminal statutes, RICO allegations, allegations regarding her loss of health insurance, allegations that the Settlement Agreement is unenforceable, allegations that the United States breached the terms of the Settlement Agreement, and complaints of the Merit System Protection Board's findings regarding her re-employment and restoration rights. The United States moved to dismiss Rogerson's Complaint on the ground that the Complaint failed to state a claim for which relief could be granted. The District Court granted the United States' motion and, subsequently, Rogerson filed this appeal.

ARGUMENT

Eighth Circuit Rule 47B allows this Court to summarily affirm the District Court "where a comprehensive opinion from this court would add nothing of substance to the reasoning set forth by the district court..." Barnes v. United States, 230 F3d 1362, 2000 WL 889838 (8th Cir. 2000) (unpublished). The rule

describes the standard in similar terms:

> A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:
> (4) no error law appears.

8th Cir. R. 47B (citing relevant excerpts).

A. Settlement Agreement

The current appeal involves issues which are untimely, unsupported, lacking in jurisdiction, and previously litigated and disposed of. The primary issue before this Court is (1) whether the District Court erred in holding that the Settlement Agreement is enforceable; and, (2) whether the District Court's application of the terms contained in the Settlement Agreement to Plaintiff's Complaint was an error of law.

The District Court held that, as a matter of law, the terms of the Settlement Agreement were unambiguous and clear and, therefore, it was unnecessary to resolve any factual issues. The plain language of the Settlement Agreement dictates that Rogerson waived her right to bring any future lawsuits which are based upon the conduct of the Air Force and its employees regarding discrimination, sexual harassment, age, and reprisal, as well as "any and all claims relevant to the plaintiff's past and present employment with the United States Air Force." See Addendum 2 (Settlement Agreement filed 2/8/96)

The District Court correctly held that, as a matter of law, the valid Settlement Agreement barred all of Rogerson's claims which relate to the conduct of the Air Force and its employees prior to January 31, 1996.

1. Benefits Under the Office of Worker's Compensation Program

As it relates to Rogerson's complaint that the United States breached the terms of the Settlement Agreement affecting Rogerson's benefits or status under the Office of Worker's Compensation Program ("OWPC") [sic], the District Court held as a matter of law that the provision in the Settlement Agreement was not reasonably capable of being understood in more than one sense and, therefore, it was unnecessary to hold an evidentiary hearing. The plain language of the Settlement Agreement provides that the United States Air Force "will not officially act, or fail to act, for the purpose of adversely affecting" Plaintiff's benefits or status under the OWCP. The District Court held there is no obligation on the part of the United States to forever protect Rogerson's FECA status and benefits, as claimed by Rogerson.

Because Rogerson erroneously believes that the United States Air Force has an obligation to forever protect her FECA status and benefits, when indeed there is no obligation to do so, the District Court correctly held, as a matter of law, the United States had not breached the unambiguous terms of the Settlement Agreement.

2. Health Insurance

Rogerson's Complaint alleged that her health insurance was improperly terminated. However, Rogerson failed to plead in her Complaint that she had previously exhausted her administrative remedies. The District Court properly dismissed Rogerson's claim regarding health insurance without prejudice, because she failed to set forth the jurisdictional requirement, to-wit: exhaustion of administrative remedies.

3. FECA Benefits

Rogerson presented a claim regarding the termination of her Federal Employees' Compensation Act

("FECA"). The District Court also properly dismissed this claim for lack of subject matter jurisdiction because 20 CFR § 10.600 does not authorize judicial review of the Office of Worker's Compensation Program's decision to deny a payment under FECA.

4. MSPB Appeal

Rogerson attempted to obtain recognition of her re-employment and restoration rights from the Merit Systems Protection Board ("MSPB"). The MSPB issued an unfavorable decision to Rogerson. The District Court correctly concluded that 5 USC § 7703 bars the District Court from jurisdiction over complaints Rogerson has regarding the MSPB's decision.

B. Criminal Allegations

Rogerson's Complaint alleged that the United States violated various federal criminal statutes: Fraud and false statements, 18 USC § 1018; Fraud in connection with electronic mail, 18 USC § 1037; Attempt and conspiracy to commit mail fraud, 18 USC § 1349; Obstruction of proceedings before departments, agencies, and committees, 18 USC § 1505; Conspiracy, 18 USC § 371; Conspiracy against rights, 18 USC § 241; Deprivation of relief benefits, 18 USC § 246; Solicitation of employment and receipt of unapproved fees concerning federal employees' compensation, 18 USC § 292; contracts in excess of specific appropriation, 18 USC § 435; False statement or fraud to obtain federal employees' compensation, 18 USC § 1920; Criminal racketeering, 18 USC § 1957; Criminal racketeering, 18 USC § 1954; and, Torture, 18 USC § 2340, 2341.

The District Court correctly concluded that, as a matter of law, none of the above criminal statutes create a private cause of action, based upon a review of the factors listed in Wisdom v. First Midwest Bank of Poplar Bluff, 167 F.3d 402, 407 (8th Cir. 1999). Because Rogerson has no private cause of action against

the United States for alleged violations of criminal statutes, this Court should summarily affirm the District Court's ruling.

C. RICO Allegations

Rogerson claimed that the United States violated various provisions under the Racketeer Influenced and Corrupt Organizations Act (RICO). The District Court held that it lacked subject matter jurisdiction over these claims. It is well established that no provision under RICO waives the sovereign immunity of the United States. Accordingly, the District Court correctly concluded that, because there is no waiver of sovereign immunity, the court lacked subject matter jurisdiction.

D. Validity of District Court's Order

Rogerson complains that the Order dismissing her Complaint is an "unsupported conclusion" because Judge Bogue's original signature is not on the Order. Rogerson provides no legal authority that an Order containing a conformed signature renders it invalid.

On the contrary, Fed. R. Civ. P. 5(d)(3) specifically provides that electronically signed documents may be filed by the District Court.

> A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States... A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.
>
> Fed. R. Civ. P. 5(d)(3)(citing relevant excerpts).

Local Rule 5.1 for the District of South Dakota provides that, "documents may be filed, signed, and verified by electronic means to the extent and in the manner authorized by the Case Management/

Electronic Case Filing (CM/ECF) Administrative Procedures established by the Court." D.S.D. Civ. LR 5.1.

This Court has rejected an argument similar to Rogerson's regarding the validity of an unsigned order in United States v. Euge, 691 F.2d 379 (8th Cir. 1982). The Court stated, "Appellant cites no authority for the alleged requirement that the show cause order served upon the appellant must be an original or copy signed by the district judge, and we know of none. The conformed copy served bore the official seal of the district court and the signature of the clerk. No more was required." Id. At 382.

The District Court's Order contains a valid signature in accordance with Local Rule 5.1 and Fed. R. Civ. P. 5(d)(3) and, accordingly, no error of law exists which would render the District Court's Order invalid or unenforceable.

CONCLUSION

The United States submits that this appeal is well -suited for summary affirmance under the provisions of Rule 47B since an opinion would have no precedential value and there are no errors of law. Rogerson's appeal is simply a rehashing of her previous lawsuits which have either been dismissed by Rogerson or disposed of by the Court. A review of Rogerson's brief supports the conclusion that there are no issues which would give rise to a decision of precedential value and that disposition of the appeal by virtue of Eighth Circuit Rule 47B is in the interests of justice as well as judicial economy. The jurisprudence of the Eighth Circuit would not benefit from a formal opinion from the Court. Accordingly, the United States respectfully requests that this Court summarily affirm the District Court's Order and hold the current briefing schedule in abeyance pending its determination.

Dated this 12th day of August, 2009.

MARTY J. JACKLEY
United States Attorney
By:

/s/

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

KAY L. ROGERSON, Plaintiff,	)	CV 08-5060-AWB
vs	)	ORDER GRANTING
UNITED STATES, OF AMERICA Defendant.	)	MOTION TO DISMISS

Pursuant to the Order Granting Defendant's Motion to Dismiss, it is hereby

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of defendant and against plaintiff.

Dated: May 13, 2009

BY THE COURT:

(unsigned document, however the following is typed above the judge's name)

"/s/ Andrew W. Bogue"

ANDREW W. BOGUE
SENIOR DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

KAY L. ROGERSON,	)	
Plaintiff,	)	CV 08-5060-AWB
vs	)	
UNITED STATES ,	)	ORDER GRANTING
OF AMERICA	)	MOTION TO DISMISS
Defendant.	)	

Defendant has filed a motion to dismiss and supporting documents. Docket 14, 15, 17, 20. Plaintiff has responded. Docket 16, 21. For the reasons stated below, the motion is granted.

FACTUAL BACKGROUND

On March 13, 1992, Plaintiff filed a complaint against the United States Air Force alleging sexual discrimination, sexual harassment, and retaliation. CIV 92-5038, Docket 1. On February 8, 1996, a Stipulation for Compromise Settlement (Settlement) was filed, stating that it was a settlement of the action which included "allegations of employment discrimination,...and all claims relevant to the plaintiff's past and present employment with the United States Air Force." CIV. 92-5038, Docket 152. In the settlement agreement, the USAF agreed to pay a monetary settlement and promised that it would not "official act, or fail to act, for the purpose of adversely affecting plaintiff ROGERSON'S Department of Labor, Office of Workers Compensation Program (OWCP) benefits or status." Id. at ¶ 3. In exchange, Plaintiff agreed to release the USAF and its employees of all causes of action "of every nature" which arose out of the factual basis of that proceeding. Id. at ¶ 4. Rogerson also agreed that she would not apply for employment with the USAF "and will never work for the Air Force

again from this day forward." Id. at ¶ 5a.

In April 2000, Plaintiff filed a complaint against the United States Air Force, alleging that the USAF discriminated against her both before and after the Settlement was signed; was in breach of the Settlement; and improperly terminated her employment, refused to reemploy her, and ended her medical benefits CV.00-5033, Docket 1. She also challenged the validity of the Settlement and alleged that she was coerced into signing it. Id. at ¶ ¶ 8-11. Six months later, Plaintiff and her attorney signed a stipulation for dismissal with prejudice, which the Court granted. CV.00-5033, Docket 25, 26.

Plaintiff filed this action in July 2008. CV.08-5060, Docket 1. Her complaint contains the following allegations:

- Allegations based on federal criminal statutes:
  - Fraud and false statements, 18 USC § 1018
  - Fraud in connection with electronic mail, 18 USC § 1037
  - Attempt and conspiracy to commit fraud, 18 USC § 1349 (defined in § 1346)
  - Obstruction of proceedings before departments, agencies, and committees, 18 USC § 1505
  - Conspiracy, 18 USC § 371
  - Conspiracy against rights, 18 USC § 241
  - Deprivation of relief benefits, 18 USC § 246
  - Solicitation of employment and receipt of unapproved fees concerning federal employees' compensation 18 USC § 292
  - Contracts in excess of specific appropriation, 18 USC § 435
  - False statement or fraud to obtain federal employees' compensation, 18 USC § 1920
  - Criminal racketeering; Engaging in monetary transactions in property derived from specified

unlawful activity, 18 USC § 1957
  - Criminal racketeering' Offer, acceptance, or solicitation to influence operations of employee benefit plan, 18 USC § 1954
  - Torture, 18 USC § § 2340, 2341
- Racketeer Influenced and Corrupt Organizations (RICO) allegations: 18 USC § 1961 *et seq.*
- Allegations related to the loss of health insurance, 5 USC § 8901 *et al.*
- Allegations challenging the validity of the Settlement: Specifically, Plaintiff alleges that the Settlement is unenforceable as a waiver of her rights to seek reemployment with the USAF and/or the federal government and to file subsequent lawsuits. Further, Plaintiff alleges that the USAF promised "under false pretenses" to "not officially act, or fail to act, for the purpose of adversely affecting" plaintiff's OWCP benefits or status, all the while knowing that it did not have any control over Plaintiff's OWCP benefits See Docket 1-3, ¶ 3b. Plaintiff complains of the actions of the USAF, the United States Attorney's Office, and the United States District Court in ratifying the "fraudulent" Settlement and in dismissing her 2000 civil action with prejudice.
- Plaintiff alleges that the United States has breached the terms they agreed to in the Settlement. Plaintiff alleges that, since the Settlement, the USAF and other entities have failed to act to "uphold" her OWCP benefits, as she believes they promised in the Settlement. Docket 1, page 13; see also pages 7-9, 11-13. As she believes that the Settlement has been breached, Plaintiff alleges that her attempts to secure reemployment with the USAF are not prohibited, and that actions by U.S. employees to discourage her from seeking reemployment are improper as violative of her rights,

including her freedom of speech. Docket 1, p12-14.

- Plaintiff also complains of the Merit Systems Protection Board's (MSPB) findings that she was not entitled to reemployment or restoration rights. Docket 1, page 9-11; Docket 1-4, 1-5, 1-6 (MSPB decisions). However, Plaintiff alleges that this action is not an appeal of the MSPB's decisions. Docket 16, page 6.

Defendant filed a motion to dismiss the complaint. Docket 14. The matter is now fully briefed and ripe for disposition.

STANDARD OF REVIEW

Defendant moves to dismiss Plaintiff's complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject -matter jurisdiction, and Fed R. Civ. P. 12(b)(6), o the ground that the complaint fails to state a claim against them for which relief can be granted. A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) will be granted in cases where the Court finds it lacks subject matter jurisdiction over Plaintiff's claims. The Court may look at matters outside the pleadings on a motion to dismiss under Rule 12(b)(1). Osborn v. United States, 918 F.2d 724, 728 n.4(8th Cir. 1990). Whether they involve questions of law or fact, jurisdictional issues are for the court to decide. Id. at 729. Unlike a Rule 12(b)(6) motion, "no presumptive truthfulness attaches to the plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id. at 730. The plaintiff has the burden of proof to show that the court has jurisdiction. Id

A motion to dismiss for a failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) requires the court to review only the pleadings to determine whether they

state a claim upon which relief can be granted. "A complaint must not be dismissed under 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief.'" Doe v. Sch. Dist. Of Norfolk, 340 F.3d 605, 613 (8th Cir. 2003) (quoting Gordon v. Hansen, 168 F.3d 1109, 1113 (8th Cir. 1999)). "[W]e accept the complaint's factual allegations as true and construe them in a light most favorable to the plaintiff." Id. (citation omitted). The Eighth Circuit has emphasized that

> [a] complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997).

DISCUSSION

I. The Settlement

The majority of Plaintiff's complaint challenges the validity of the Settlement signed on February 8, 1996. Specifically, she argues that the Settlement is "fraudulent" because Defendant promised things which it knew it could not deliver, and because the Settlement improperly restricts her rights to seek employment with the USAF or any United States agency and her right to sue the United States. In its motion to dismiss, Defendant states that these challenges to the terms of the Settlement should be dismissed under *res judicata* in light of her earlier civil

claim, CV. 00-5033. That action was dismissed with prejudice, pursuant to a stipulation to dismiss signed by Plaintiff and her attorney.

Under res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Yankton Sioux Tribe v. U.S. Dep't of Health and Human Servs., 533 F.3d 634, 639 (8th Cir. 2008) (citing Allen v. McCurry, 449 U.S. 90, 94 (1980)). A party seeking dismissal based on res judicata must show:

> (1)the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action.

Id. (citation omitted). The Eighth Circuit has stated that res judicata does "not apply where... the issues or causes of action sought to be precluded in a subsequent proceeding were allegedly determined in a stipulation or a judgment by consent." Gall v. South Branch Nat'l Bank of S.D., 783 F.2d 125, 127 (8th Cir. 1986); see also Gronseth v. Chester Rural Fire Protection Dist., 2009 WL 983130, *3-4 (D.S.D. Apr. 9, 2009). The Court does not believe that Plaintiff's voluntary dismissal of her previous civil case, Docket CV.00-5033, is a judgment on the merits, even though the stipulation provides that the case be dismissed "with prejudice." The Court in that case never considered the merits of the case, including a pending summary judgment motion, prior to its dismissal pursuant to the stipulation. Therefore, the Court concludes that the dismissal of Plaintiff's 2000 civil case does not render this immediate claim precluded under the doctrine of res judicata.

Plaintiff's settlement agreement is a different story, however. If the Settlement is found to be valid,

the majority of Plaintiff's claims related to the conduct of Defendant and its agents prior to the date of the Settlement are not actionable, as she waived her right to bring such claims by the terms of the Settlement. See Larken v. Wray, 189 F.3d 729, 732 (8th Cir. 1999).

"Trial courts have 'the inherent power to summarily enforce a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous." Lewis v. Benjamin Moore & Co., 574 N.W.2d 887, 888 (S.D. 1998) (citing Gatz v. Southwest Bank of Omaha, 836 F.2d 1089, 1095 (8th Cir. 1988)). A settlement agreement is contractual in nature and subject to the same rules of construction as contracts. Id. At 889. It is a question of law as to whether a settlement agreement is ambiguous. "Ambiguity exists in a settlement agreement when the language is reasonably capable of being understood in more than one sense." Id. "Parol or extrinsic evidence will not be admitted to vary the terms of a written instrument that is not found ambiguous." Id. (citations omitted). The Court must hold an evidentiary hearing only when there is a "substantial factual dispute concerning the existence or terms of the settlement agreement or when the situation presents complex factual issues." Id. at 888 (citing Gatz, 836 F.2d at 1095).

In this case, the Court finds that the Settlement is not ambiguous. Plaintiff clearly waives her right to bring any future lawsuits which are based upon the conduct of the Air Force and its employees regarding discrimination, sexual harassment, age, and reprisal, as well as "any and all claims relevant to the plaintiff's past and present employment with the United States Air Force." Docket 1-3 ¶¶ 1, 4. Plaintiff also agreed "that she will not return to work for the Air

Force in her current position or any other position... [and] will not apply for employment with the Air Force in the future, and will never work for the Air Force again from this day forward[.]" Id. at ¶ 5a. The Court finds as a matter of law that these provisions are unambiguous and clear, and the Court does not believe that any substantial factual issues exist which must be resolved before it reaches this conclusion. See Gatz, 836 F.2d at 1095.

The obligations of the Air Force are equally clear to the Court. In agreeing that "it will not officially act, or fail to act, for the purpose of *adversely* affecting" Plaintiff's benefits or status under the OWCP, the Air Force merely agreed that they would not do anything which would harm Plaintiff's worker's compensation benefits. Id. At ¶ 3b (emphasis added). The Court finds that this provision is unambiguous, as this provision is not "reasonably capable of being understood in more than one sense." Lewis, 574 N.W.2d at 889. It is unreasonable for Plaintiff to conclude from this provision that the Air Force promised in the Settlement that her "FECA status and benefits would be forever protected." Docket 1, page 12. Additionally, as no substantial factual disputes exist concerning the terms of the settlement agreement an evidentiary hearing is not necessary. See TCBY Systems, Inc. v. EBG Assoc., Inc., 2 F.3d 288, 291 (8th Cir. 1993) (finding no hearing was required to evaluate defendant's subjective understanding of the legal effect of a dismissal with prejudice).

As the Court concludes as a matter of law that the terms of the Settlement are clear and unambiguous, the Court chooses to enforce the agreement. Accordingly, it dismisses Plaintiff's claims which relate to the conduct of the Air Force and its employees prior to January 31, 1996, as barred by the Settlement signed by Plaintiff.

Further, the Court concludes that, based on the unambiguous terms of the Settlement, Defendant has not breached the terms of the Settlement. Plaintiff alleges that Defendant has failed to protect her FECA benefits and status, and that she has been damage as a result. However, as the Court has found that the Settlement requires no affirmative conduct from Defendant to protect Plaintiff's benefits, no breach can result from their failure to so act. Additionally, Plaintiff states no claim when she contends that staff of the U.S. Attorney's Office have informed her that her continued attempts to gain reemployment with the Air Force are prohibited by the Settlement, as their conduct in doing so is in accordance with the unambiguous terms of the Settlement. For all of these reasons, the Court dismisses with prejudice Plaintiff's claims with regard to the validity of the settlement and allegations of Defendant's breach of the settlement.

II. Criminal Allegations

Plaintiff alleges that Defendant and its agents violated many criminal laws. Generally, in determining whether a criminal statute provides an implied private right of action, the courts examine four factors to evaluate whether Congress intended such a private right. Wisdome v. First Midwest Bank of Poplar Bluff, 167 F.3d 402, 407 (8th Cir. 1999).

Dated: May 13, 2009

BY THE COURT:
(unsigned document, however the following is typed above the judge's name)

"/s/ Andrew W. Bogue"

ANDREW W. BOGUE
SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

KAY L. ROGERSON,	:	
Plaintiff,	:	
-vs-	:	CIV. 92-5038
SHEILA E. WIDNALL,	:	
Defendant.	:	

STIPULATION FOR
COMPROMISE SETTLEMENT

It is hereby agreed and stipulated by and between the plaintiff, KAY L. ROGERSON, personally, and the defendant, SHEILA E. WIDNALL, Secretary, United States Air Force, by and through their respective attorneys, as follows:

1. That the parties do hereby agree to settle and compromise the above-entitled action involving allegations of employment discrimination, including but not limited to sex, sexual harassment, age, and reprisal, and any and all claims relevant to the plaintiff's past and present employment with the United States Air Force, upon the terms indicated herein.

2. This settlement agreement does not constitute an admission of liability or fault of the defendant, or any past, present or future employees, representatives, servants, agents, or any other persons standing in any representative capacity, nor shall this agreement or any provision hereof, be used in conjunction with any judicial, administrative, quasi-judicial, or any other form of proceeding, for the purpose of attempting to establish any such liability or fault.

3. That, in consideration of the undertakings of plaintiff ROGERSON herein,

a. The United States, on behalf of the defendant Secretary, United States Air Force, agrees to

pay plaintiff the sum of $300,000 in compensatory damages, and $60,000 in attorney fees and costs, which sums represent payment in full settlement, accord and satisfaction of any and all monetary claims by the plaintiff, including, but not limited to all attorneys' fees and costs, paid by check made payable jointly to plaintiff ROGERSON and Attorneys of Record, MARK S. FALK AND KENNETH E. JASPER.

b. The United States Air Force agrees that it will not officially act, or fail to act, for the purpose of adversely affecting plaintiff ROGERSON'S Department of Labor, Office of Workers Compensation Program (OWCP) benefits and status.

4. Plaintiff KAY L. ROGERSON hereby agrees to accept said actions set forth in paragraph 3 herein in full settlement and satisfaction of any claims or other rights of action and does, by these premises remise, release, acquit and forever discharge said defendant, United States Air Force, and/or any of its past, present or future employees, representatives, servants, agents or any other persons standing in any representative capacity by virtue of law, equity, statutory or administrative ruling or provision, of all debts, actions, suits, causes of action, damages, grievances, any and all claims, demands and liabilities whatsoever of every nature, whether in law, equity, administratively or otherwise, specifically releasing all causes of action, rights to recovery or other rights which might arise out of said acs, facts, transactions and circumstances upon which the instant proceeding was based, or which might arise out of any acts, facts, transactions and circumstances upon which any pending administrative and/or judicial complaints are based, or could have been based, and any other discrimination in employment as alleged by Plaintiff in her complaint or in the administrative process, which formed or could have formed the basis of the instant

proceeding, whether known or unknown, suspected or unsuspected, presently existent or such as might arise in the future.

This release is made by plaintiff ROGERSON for herself, and on behalf of her heirs, executors, administrators, assigns, devisees, legatees, subrogees and any other persons standing in any representative capacity whatsoever by virtue of law, equity, statutory or administrative ruling or provision, each and all of whom shall be bound by the terms of this agreement.

5. That in exchange for the actions enumerated in paragraph 3:

a. plaintiff ROGERSON agrees that she will not return to work for the Air Force in her current position or any other position, effective the date of the signing of this agreement. As part of this settlement agreement plaintiff will not apply for employment with the Air Force in the future, and will never work for the Air Force again from this day forward. Plaintiff understands that this will result in her termination from employment with the Air Force pursuant to this agreement and agrees not to challenge this involuntary termination in any judicial, administrative or grievance forum.

b. plaintiff ROGERSON will withdraw with prejudice all pending EEO complaints, both administrative and judicial, harassment, age and reprisal complaints, and will withdraw any and all pending grievances, complaints and/or appeals relating to her employment with the United States Air Force, whether or not they are discrimination related, against the United States Air Force.

c. plaintiff ROGERSON will file with the Clerk of this Court, a dismissal of the above action with prejudice, each party bearing its costs.

6. The parties to this compromise settlement rep-

resent that the respective undersigned parties and counsel have full authority to approve the provisions of this compromise settlement, to execute this compromise settlement and to legally bind the parties to this compromise settlement, in full and final settlement of their disputes.

7. The plaintiff Rogerson specifically warrants to all parties and signatories to this agreement that she is entering into this agreement voluntarily and without any coercion or duress, that she has read this agreement in full and discussed all of its provisions with her undersigned attorneys of record and that she fully understands the meaning and consequences of all of its provisions, and further that she fully understands that by entering into this agreement she is terminating her employment relationship with the United States Air Force and terminating any and all past and pending employment related disputes of any kind whatsoever, with the United States Air Force.

8. The plaintiff Rogerson specifically warrants to all parties and signatories to this agreement that she is mentally competent, and that she is currently suffering no mental disability which prevents her from understanding the full meaning and consequences of entering into this agreement.

Executed this 31st day of January, 1996.

/s/
KAY L. ROGERSON,
Plaintiff

/s/
MARK E. FALK,
/s/
KENNETH E. JASPER
Attorneys for Plaintiff

(no signature on Plaintiff's copy)
KAREN E. SCHRIER
/s/
BONNIE P. ULRICH
Assistant U.S. Attorney
Attorneys for Defendant

UNITED STATES DISTRICT COURT
District of South Dakota, Western Division

KAY L. ROGERSON
PLAINTIFF,

v

SUMMONS IN A CIVIL ACTION

Case Number: CIV 92-5038

DONALD B. RICE,
Secretary,
United States Air Force,
DEFENDANT

TO: Secretary of the Air Force
The Honorable Donald B. Rice
The Pentagon
Washington, D.C. 20330-1000

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

Plaintiff's Attorney: Mr. Dennis H. Hill
COSTELLO, PORTER, HILL
HEISTERKAMP & BUSHNELL
P.O. Box 290
Rapid City, SD 57709

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM F. CLAYTON — March 13, 1992
(Date)

/s/ Jeanne L. Fairhead
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

KAY L. ROGERSON	)	Civil No. 92-5038
Plaintiff	)	
vs	)	
DONALD B. RICE	)	COMPLAINT
Secretary, United States	)	
Department of the Air Force	)	
Defendant.	)	

I.

Plaintiff, Kay Rogerson, a female civilian employee of the United States Department of the Air Force, brings this action under 42 U.S.C. § 2000e-16 to redress the wrongs done to her by Defendant, whose actions towards Plaintiff have constituted sexual discrimination, sexual harassment, and retaliation.

II.

On February 4, 1986, Plaintiff made a formal complaint of her charges to the Air Force. After extensive administrative litigation, this complaint was settled on January 9, 1991. Defendant, however, has continued the course of sexual discrimination, sexual harassment, and retaliation, and has failed to comply with the 1991 settlement. Plaintiff timely sought to reinstate her 1986 complaint before the agency, and has exhausted her administrative remedies in this regard, including an appeal before the United States Equal Employment Opportunity Commission. On February 17, 1992, Plaintiff received a copy of the decision of the EEOC, informing Plaintiff of her right to sue within thirty (30) days.

III.

Jurisdiction is conferred on this Court by 42 U.S.C. §§ 2000e-5, 2000e-16 and 28 U.S.C. § 1343.

IV.

Plaintiff is employed as a supervisory General Engineer in the Engineering and Environmental Planning Branch at Ellsworth Air Force Base, South Dakota. Plaintiff has at all times rendered consistently superior performance of her duties in this position.

V.

Following the settlement of a previous EEO complaint filed in 1981, Plaintiff was subjected to a "counseling" conducted by Colonel Beauchemin on October 17, 1985. In this meeting Plaintiff was "counseled" to wear suits like men, but without ties, even though no civilian dress code existed; Plaintiff was "counseled" reflecting stricter employment standards than those imposed on males of the same level as Plaintiff; and during this meeting Colonel Beauchemin continually referred to the short period of time she had held her job, the "transition period", and her job performance, all referring to Plaintiff's having been placed in her position as the result of the outcome of her earlier complaint. Moreover, Plaintiff's performance rating was downgraded from "superior" to "excellent", resulting in a loss of raises which she would have otherwise received.

VI.

Such actions constituted sexual discrimination, in that Plaintiff is a female and received treatment different from that accorded similarly situated male employees.

VII.

Such actions constituted retaliation, in that Plaintiff had engaged in the protected activity of filing an EEO complaint against the Air Force; the Air Force was aware of this complaint; and the Air Force took actions adversely impacting Plaintiff with the motive to retaliate against her for her complaint.

VIII.

Such conduct constituted sexual harassment in that it was verbal conduct of a sexual nature with the purpose or effect of unreasonably interfering with an individual's work performance and creating an intimidating, hostile, and offensive working environment.

IX.

On January 9, 1991, Plaintiff and Defendant agreed to a settlement of Plaintiff's administrative complaint arising from said sexual discrimination, sexual harassment, and retaliation, in which Defendant agreed that:

a. The Complainant's personnel records will reflect a Supervision rating on her annual performance rating for the period of 1 July 1984 through 30 June 1985. [Complainant] has previously been awarded, on 11 September 1986, the monetary benefits resulting from the Superior rating.
b. The Complainant's annual performance rating for the period of 1 July 1985 to 30 June 1986 will be upgraded from Excellent to Superior. The Complainant will be awarded appropriate adjustments to merit pay and the Performance Management and Recognition System (PMRS) performance award based on the Superior rating.
c. The Complainant's annual performance rating for the period of 1 July 1988 to 30 June 1989 will be upgraded from Fully Successful to Excellent. The Complainant will be awarded appropriate adjustments to merit pay and the PMRS performance award based on the Excellent rating.
d. The Agency will use its best efforts to have a Classification Specialist from either Military Airlift Command or Air Force Logistics Command conduct an audit upon the Complainant's posi-

tion. The Classification audit will be scheduled for July 1991. The selected Classification Specialist will assist the Complainant's rating official (Base Civil Engineer) and the Complainant prepare a position description for the Complaint's (sic) position. The position description will be based upon the current duties performed by Complainant as Branch Chief, Engineering and Environmental Planning Branch, as of the date of the Settlement Agreement. When conducting the classification audit the Classification Specialist will consider necessary information to determine the proper classification of the Complainant's position. In the event the Base Civil Engineer and the Complainant cannot agree upon content and terminology of the position description within 30 days after the outside Classification Specialist commences the classification audit, the recommendations and findings of the outside Classification Specialist as to the content of the position description will be accepted by the parties.

Defendant has failed to carry out these provisions.

X.

Throughout her employment in her position and continuing to the present time, Plaintiff has been subjected to extreme mental cruelty and extreme stress; has been denied promotion and has had to fight for her performance ratings when other similarly situated male General Engineer employees were upgraded; has had to perform at much higher standards than her male counterparts; and has been subjected to continuous ridicule adversely affecting her health, attitude, and well-being, all solely on account of the fact that she is a female.

WHEREFORE, Plaintiff requests that the Court enter its order:

1. Enjoining Defendant and Defendant's agents, employees and officers from further acts of sexual discrimination, sexual harassment, and retaliation against Plaintiff;

2. Requiring Defendant to abide by its settlement agreement of January 9, 1991;

3. Awarding Plaintiff such promotions and increases in pay and benefits to which she would have been entitled in the absence of Defendants' acts of sexual discrimination, sexual harassment, and retaliation;

4. Awarding Plaintiff her attorney's fees, costs, and disbursements; and

5. For such other relief as this Court deems fit and proper.

COSTELLO, PORTER, HILL
HEISTERKAMP & BUSHNELL

/s/

By: Dennis H. Hill
Attorneys for Plaintiff
PO Box 290
Rapid City, SD 57709
605-343-2410

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

KAY L. ROGERSON	)	Civil No. 92-5038
Plaintiff	)	
vs	)	AMENDED
DONALD B. RICE	)	COMPLAINT
Secretary, United States	)	
Department of the Air Force	)	
Defendant.	)	

[Please note that the first ten paragraphs of this AMENDED COMPLAINT are exactly the same as the first ten paragraphs of the original complaint submitted to the Court on March 13, 1992. Therefore, petitioner has avoided duplication of information and is just providing the actual amendments to the complaint, as follows.]

XI.

Those acts alleged in Paragraph X, including those constituting unwelcome sexual harassment and retaliation, occurring subsequent to November 21, 1991, and up to the present date constitute unlawful intentional discrimination by Defendant against Plaintiff, and as a result she has suffered future pecuniary losses in the form of future wages and fringe benefits lost because of Defendant's wrongful acts, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

WHEREFORE, Plaintiff requests that the Court enter its order:

1. Enjoining Defendant and Defendant's agents, employees and officers from further acts of sexual discrimination, sexual harassment, and retaliation against Plaintiff;

2. Awarding Plaintiff such promotions and increases in pay and benefits to which she would have been entitled in the absence of Defendants' acts of sexual discrimination, sexual harassment, and retaliation;

3. Awarding Plaintiff compensatory damages, in an amount to be proved at trial for those intentional discriminatory acts by Defendant against Plaintiff occurring subsequent to November 21, 1991 and up to the present date for Plaintiff's future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses;

4. Awarding Plaintiff her attorney's fees, costs, and disbursements; and

5. For such other relief as this Court deems fit and proper.

Dated this 15th day of March, 1995.

COSTELLO, PORTER, HILL
HEISTERKAMP & BUSHNELL

/s/

By: Dennis H. Hill
Attorneys for Plaintiff
PO Box 290
Rapid City, SD 57709
605-343-2410

PLAINTIFF REQUESTS TRIAL BY JURY FOR HER CLAIM FOR COMPENSARY DAMAGES FOR ACTS OCCURRING SUBSEQUENT TO NOVEMBER 21, 1991.